

Jenny Scovis, Esq., State Bar No. 87026
Kim D. Scovis, Esq., State Bar No. 182059
LAW OFFICES OF KIM D. SCOVIS
223 East Thousand Oaks Boulevard, Suite 412
Thousand Oaks, California 91360
Telephone: (805) 496-6413 Facsimile: (805) 379-3966

Attorneys for Plaintiff, MARIA LAZOS as an individual, and *THE ESTATE OF THOMAS BARRERA, By and Through its Successor in Interest, MARIA LAZOS*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA LAZOS, *THE ESTATE OF THOMAS BARRERA, By and Through its Successor in Interest, MARIA LAZOS*

Plaintiff,

vs.

CITY OF OXNARD; OXNARD POLICE DEPARTMENT; POLICE CHIEF JOHN CROMBACH; ANDREW SALINA, and DOES 1-10

Defendants.

Case No. CV08-02987-RGK (SHx)
(consolidated w/ CV 08-05153 RGK)

PLAINTIFFS OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 1 TO EXCLUDE PLAINTIFF'S EXPERT WITNESSES

DATE: August 11, 2009
TIME:
DEPT: "850"

AND CONSOLIDATED ACTION

Plaintiffs, MARIA LAZOS, TOMAS BARRERA and *THE ESTATE OF THOMAS BARRERA BY AND THROUGH ITS SUCCESSORS IN INTEREST MARIA LAZOS and TOMAS BARRERA* do hereby submit their Opposition to Defendants' Motion in Limine seeking an Order prohibiting Plaintiffs from introducing Expert Witness Evidence as follows:

1 In the above-entitled action, the Court provided counsel for all parties
 2 the "Order for Jury Trial"(hereinafter "The Order"). Page three (3), lines 20-26 of The
 3 Order, under the subtitle "Final Pre-Trial Conference" reads in pertinent part as follows:

4 "If expert witnesses are to be called at trial, each party shall list and identify
 5 their respective expert witnesses.....If expert witnesses are to be called at
 6 trial, the parties **shall** exchange at the Final Pre-Trial Conference short
 7 narrative statements of the qualifications of the expert and the testimony
 8 expected to be elicited at trial. If reports of experts to be called at trial have
 9 been prepared, they shall be exchanged at the Final Pre-Trial Conference but
 10 shall not substitute for the narrative statements required." (Emphasis added).

11 *Fed. Rules Civil Procedure* §26 states in pertinent part:

12 "(a) Required Disclosures.(1) Initial Disclosure. (A) In General.Except as exempted by Rule
 13 26(a)(1)(B) **or as otherwise stipulated or ordered by the court**, a party must, without
 14 awaiting a discovery request, provide to the other parties:¶ (C) Time to Disclose Expert
 15 Testimony.A party must make these disclosures at the times and in the sequence that the
 16 court orders. **Absent a stipulation or a court order**, the disclosures must be made:(i)at least
 17 90 days before the date set for trial or for the case to be ready for trial; or (ii)if the evidence
 18 is intended solely to contradict or rebut evidence on the same subject matter identified by
 19 another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure."
 20 (Emphasis added).

21 In the case at bar, The Order for Jury Trial clearly states that the Expert Designation
 22 exchange was to take place at the Final Pretrial Conference, which is scheduled for July 27,
 23 2009. On or about May 13, 2009, Defendants served Plaintiffs counsel via mail with their
 24 Designation of Expert Witnesses. Plaintiffs had the exchange calendared for July 27, 2009.
 25 Upon receipt of Defendants' Designation, Kim Scovis, counsel for Maria Lazos, called Dirk
 26 DeGenna, counsel for Defendants. In said conversation, Ms. Scovis directed Mr. DeGenna
 27 to The Order. Mr. DeGenna replied that his assistant had calendared the Expert Designation
 28 due date, and he was not even aware of the contents of the Scheduling Order.

A private mediation in this action was scheduled for and did actually commence on
 May 22, 2009. Therefore, in an attempt to meet and confer, Plaintiffs counsel sent Mr.

1 DeGenna correspondence suggesting that the parties exchange designation of expert
2 witnesses after the mediation. Counsel offered to disclose early, but continued to maintain
3 that the due date for said exchange was July 27, 2009. Mr. DeGenna did not agree to
4 exchange expert witnesses after the mediation. Out of an abundance of caution, Plaintiff sent
5 Defendants their Expert designation on May 15, 2008 via facsimile.

6 Plaintiffs were clearly acting in good faith. Even if the Court finds that the expert
7 designation was due on May 13, 2009, Defendants were not prejudiced in any way.
8 Defendants served Plaintiffs with their Expert Designation on May 13, 2009. Plaintiffs
9 actually received said designation on May 15, 2009. On that same date, Plaintiffs sent
10 defendants via facsimile their own designation of expert witnesses. Therefore, all parties
11 received said designation on the same date.

12 In the Ninth Circuit, "the district court is given broad discretion in supervising the
13 pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order
14 ... will not be disturbed unless they evidence a clear abuse of discretion." *Miller v. Safeco*
15 *Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985).

16 Two express exceptions ameliorate the harshness of Rule 37(c)(1): the information
17 may be introduced if the parties' failure to disclose the required information is substantially
18 justified or harmless [Fed R Civ P 37(c)(1); *Wong v. Regents of the Univ. of Cal.* (9th Cir
19 2005) 410 F3d 1052, 1062; *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.* (9th Cir 2001) 259
20 F3d 1101 Copyright Cases or Patent Cases, 1106 Copyright Cases or Patent Cases—1107].

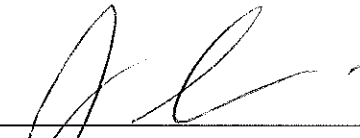
21 The burden is on the party facing sanctions to prove harmlessness [*Yeti by Molly,*
22 *Ltd. v. Deckers Outdoor Corp.* (9th Cir 2001) 259 F3d 1101. A party's late disclosure of
23 bankruptcy documents was "substantially justified" when party disclosed them shortly after
24 they were first created [*Payne v. Exxon Corp.* (9th Cir 1997) 121 F3d 503, 508]. Counsel
25 should move to compel or for sanctions as soon as the failure to properly disclose is
26 discovered [*Intercargo Ins. Co. v. Burlington N. Santa Fe R.R.* (CD Cal 2001) 185 F Supp2d
27 1103, 1107 (because defendants did not seek to compel a more adequate disclosure within
28 a reasonable time of service of the expert reports, court denied defendants' motions to strike

1 expert witness designation)].

2 As stated in more detail herein, plaintiffs were following the Court own scheduling
3 order which clearly provides a due date for the expert exchange. Defense counsel disagreed
4 as to whether the due date as dictated by this Court was a valid cut-off date. Plaintiffs
5 counsel acted in good faith by sending defendants, via facsimile, a copy of their own
6 designation. Defendants would not compromise at all, nor did they seek any relief or order
7 from the Court until the actual date of trial. For all these reasons, Defendants' Motion in
8 Limine Number One must be denied in it's entirety.

9 DATED: July 16, 2009

LAW OFFICES OF KIM D. SCOVIS

10
11 
12 JENNY SCOVIS
13 Attorneys for Plaintiff

14
15
16
17 DATED: 7-16, 2009

LAW OFFICES OF GREGORY A. YATES

18
19 
20 GREGORY A. YATES
21 Attorneys for Plaintiff